Capacity and Consent

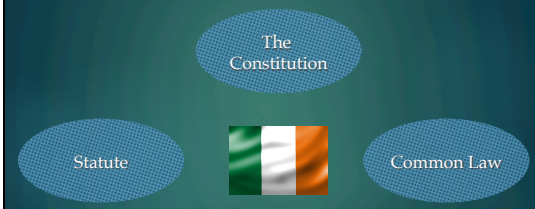
Dr David Robinson MA, MSc, MD, FRCPI

- **Legal Principles**
- Cases
- Assessing Capacity
- Assisted Decision Making Act 2016

"the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. **His own good,** either physical or moral, is not a sufficient warrant."

1859

Sources of Law



"There's another law, stronger than the common law"

"What's that?"

"The law of the land"

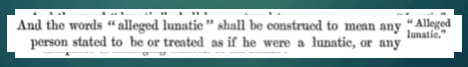
The Bull McCabe

Why are doctors involved at all?

- *"How can you declare me insane? You have never met me or examined me."*

Ludwig II 1886

- Assessment of capacity - Lunacy Regulation 1871


And the words "alleged lunatic" shall be construed to mean any "Alleged lunatic," person stated to be or treated as if he were a lunatic, or any

In Re C

- Take in and retain information
- Believe it
- Weigh the information, balancing risks and needs

[1994] 1 WLR 290, [1994] 1 All ER 819

CC vs KK

- PD, VaD
- Calls QID
- Phoned lifeline emergency number 1097 times Jan 11-Jul 11

CC vs KK

- 'if I fall over and die on the floor, then I die on the floor'

In Irish Law -

Everyone has capacity until proven otherwise

Ir Med J. 2001 Sep;94(8):234-6.
Autonomy vs welfare? Anatomy of a risky discharge.

- Ward of Court
- Enduring Power of Attorney
- Care representative (Fair Deal)
- Assisted Decision Making Act

Wardship

- Purpose is to protect property
- Is decided in absentia
- No independent representation/ appeal
- Legal costs - stamp duty + levy

Is there any alternative to taking a person into wardship for dealing with his property?

Probably not. Unless the person prior to becoming mentally incapacitated has made alternative arrangements for example by having entered into an enduring power of attorney.

www.courts.ie

Cases

J.

Cases

J.

569 days

Cases

A.

Cases

A.

308 days

Cases

D.

Cases

D.

728 days

Impact on Hospital

- average 9 at any one time
- average 18 months to process
- 3,285 bed-days per annum (=470 average medical admissions)
- €2.95 million per annum

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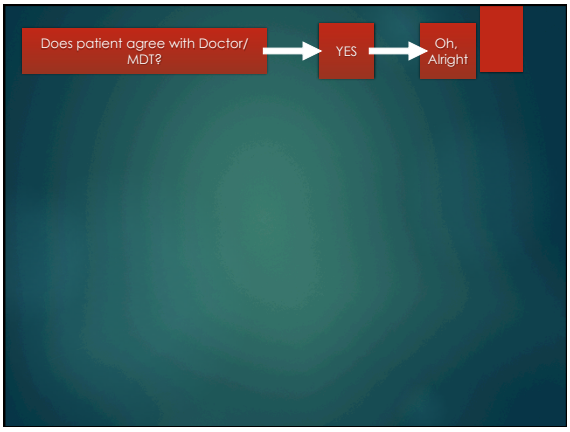

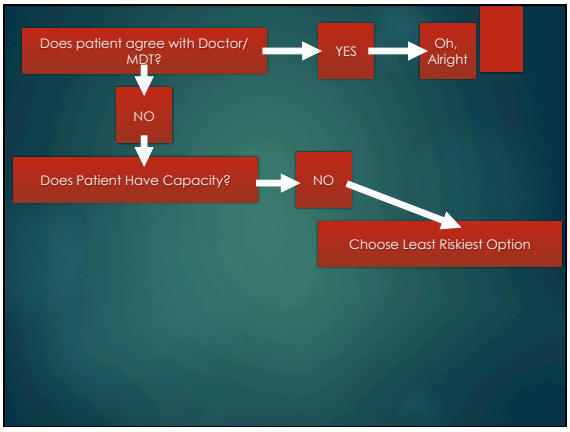

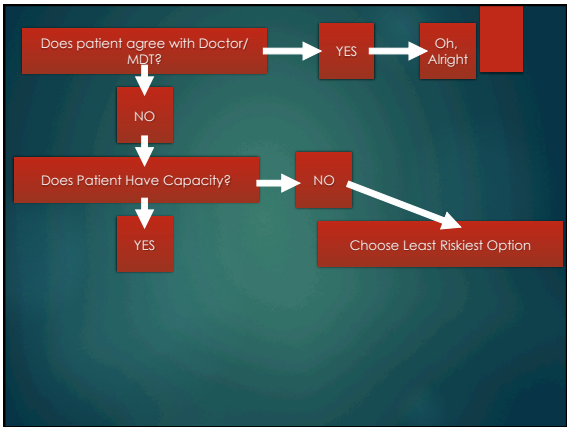

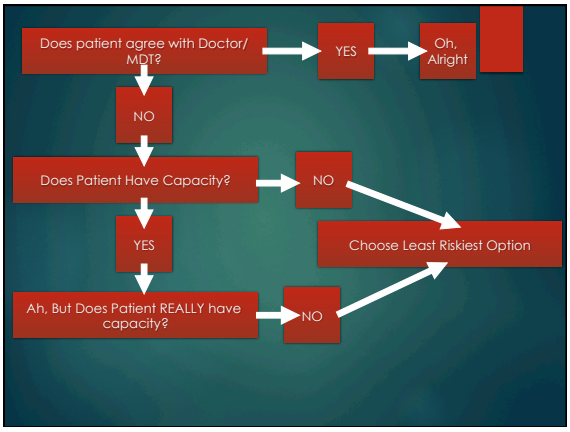

Capacity Assessment

- Why are you assessing capacity?
- What are you going to do with it?
- Why can't you do it yourself?

Capacity Assessment

- Status approach
- Outcomes approach
- Functional approach

- Ability to understand information
- Ability to retain information
- Ability to use and weigh information to make a decision
- Ability to communicate decision

Capacity - Outpatient

- Assess this person's decision making capacity ....
  - to make a will
  - to execute (create) an enduring power of attorney
  - with a view to making them a ward of court
  - with a view to registering (activating) an existing enduring power of attorney

Capacity - Inpatient

- Assess this person's decision making capacity ….
  - to consent to, or refuse treatment
  - to decide on going home
  - *To discharge self from hospital or nursing home*
  - *To make a will (end of or nearing end of life)*

- ***Capacity to go decide on going home***
- Capacity to create an enduring power of attorney
- Capacity to create a will - *testamentary capacity*
- Capacity to engage in Fair Deal (=financial capacity)
- Capacity to refuse treatment

- Capacity to go decide on going home
- Capacity to create an enduring power of attorney
- Capacity to create a will - *testamentary capacity*
- ***Capacity to engage in Fair Deal (=financial capacity)***
- Capacity to refuse treatment

- Legal Principles
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Assisted Decision Making Act 2016

- Decision-specific
- Will and preference
- Functional assessment

vs

- all-or-nothing
- best interests
- status

Assisted Decision Making Act 2016

- Decision Support Service
  - Director
  - Specialist Judges

Assisted Decision Making Act 2016

- Assistant Decision Maker
- Co-Decision Maker
- Decision Making Representative

Current controversy

- ***40.4 No citizen shall be deprived of their liberty save in accordance with law***

The Legal Position

- There is no law!
- It is unlawful to detain people who are trying to leave as technically you are depriving them of their liberty
- Strictly speaking, its unlawful to keep anyone who lacks capacity in the hospital, as they cannot express a preference
- Doctrine of necessity only applies in extreme risk, eg they are about to walk out in front of a bus

In practice:

- Common sense
- Can detain a person and apply for emergency ward of court the next day
- Becomes more complicated if person has left the hospital grounds

Summary:

- Assumption of Capacity
- Laws are out of date
- Functional Approach